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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 OTONIEL TYLER PENNINGS,
12 Plaintiff,
13 v.
14 BARRERA, et al.,
15 Defendants.

Case No.: 16cv582-JLS (MDD)

**REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE
RE: MOTION TO DISMISS
[ECF No. 12]**

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17 This Report and Recommendation is submitted to the United States
18 District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b)(1) and
19 Local Civil Rule 72.1(c) of the United States District Court for the Southern
20 District of California.

21 For the reasons set forth herein, the Court **RECOMMENDS**
22 Defendants' Motion to Dismiss be **GRANTED IN PART AND DENIED IN**
23 **PART.**

24 **I. PROCEDURAL HISTORY**

25 Plaintiff Otoniel Tyler Pennings ("Plaintiff") is a state prisoner
26 proceeding *pro se* and *in forma pauperis*. (ECF Nos. 1, 6). On March 7, 2016,
27 Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1).

1 Plaintiff's complaint sets forth various claims against four named individuals
2 working at the George Bailey Detention Facility ("GBDF") alleging that they
3 violated his civil rights by: (1) retaliating against him in violation of the First
4 Amendment; (2) imposing cruel and unusual conditions of confinement in
5 violation of the Eighth Amendment; (3) treating him inhumanely in violation
6 of the Fourteenth Amendment's Equal Protection Clause; (4) failing to
7 provide Plaintiff his due process rights in violation of the Fourteenth
8 Amendment; (5) using excessive force against him; (6) assaulting and
9 battering him; (7) providing inadequate medical care; (8) providing negligent
10 medical care; and (9) intentionally inflicting emotional distress upon him.
11 (*See id.*).

12 On October 12, 2016, Defendants Stapleton and Benjamin filed a
13 motion to dismiss some of the claims against them. (ECF No. 12).
14 Defendants contend that: (1) Plaintiff's First Amendment retaliation claim
15 against Defendant Benjamin should be dismissed because Defendant
16 Benjamin did not "prevent[] Plaintiff from engaging in protected conduct[;]"
17 (2) Plaintiff's Eighth Amendment claim against both Defendants should be
18 dismissed because Plaintiff did not allege that Defendants caused the
19 unsanitary living conditions; (3) Plaintiff's denial of religious
20 accommodations claim should be dismissed because Plaintiff did not allege
21 "facts indicating that the responding defendants denied him the kosher
22 meals, or that they were necessary for him to practice" his religion;¹ (4)
23 Plaintiff's destruction of property claim against Defendant Stapleton must be
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25
26 ¹ Defendants improperly construe Plaintiff's Fourteenth Amendment Equal
27 Protection Clause claim as a denial of religious accommodations claim under
the First Amendment.

1 dismissed because “Plaintiff does not allege the absence of an administrative
2 remedy to challenge property destruction[;]” (5) Plaintiff’s intentional
3 infliction of emotional distress claim against Defendant Stapleton should be
4 dismissed because he does not allege extreme and outrageous conduct; and
5 (6) the state law claims should be dismissed as untimely. (ECF No. 12-1 at 3-
6 7).

7 On October 13, 2016, this Court ordered Plaintiff to file a Response in
8 Opposition to Defendants’ Motion to Dismiss on or before November 3, 2016,
9 and Defendants to file a reply on or before November 10, 2016. (ECF No. 13).
10 On November 2, 2016, Plaintiff requested a 90-day continuance to file his
11 opposition to Defendants’ motion to dismiss in a duplicative action.
12 (*Pennings v. San Diego Sheriff’s Dep’t, et al.*, S.D. Cal. Civil Case No.
13 16cv2318-CAB-DHB, ECF No. 7). On January 10, 2017, District Judge
14 Bencivengo closed Plaintiff’s duplicative action and denied Plaintiff’s motion
15 for a continuance without prejudice to be re-filed in this case. (*Id.* at ECF No.
16 11). Plaintiff did not re-file the motion as directed, but the Court
17 nevertheless amended the briefing schedule and ordered Plaintiff to file a
18 Response in Opposition to Defendants’ Motion to Dismiss on or before
19 February 8, 2017, and Defendants to file a reply on or before February 15,
20 2017. (ECF No. 17). The Court granted Plaintiff one continuance and
21 ordered him to file a Response in Opposition to Defendants’ Motion to
22 Dismiss on or before March 16, 2017. (ECF Nos. 21, 22). On March 17, 2017,
23 the date of his signature, Plaintiff filed a Response in Opposition to
24 Defendants’ Motion to dismiss. (ECF No. 25). The Court will consider
25 Plaintiff’s opposition even though it was not timely filed.

26 Plaintiff opposes the motion to dismiss on the grounds that: (1)
27 Defendant Benjamin retaliated against Plaintiff by ordering he be moved “to

1 a dirty, feces-covered cell, in a module used as ‘punishment[;]’ (2) Defendant
2 Stapleton intentionally inflicted emotional distress by calling Plaintiff
3 derogatory names and assaulting him because of his religion; and (3) his
4 state law claims are timely because he mailed his Complaint on February 26,
5 2016.² (*Id.* at 5-9).

6 Defendants reply that Plaintiff’s Complaint should be dismissed
7 because: (1) Plaintiff failed to timely file his opposition; (2) Plaintiff provided
8 no proof that his Complaint was mailed on February 26, 2016; and (3)
9 Plaintiff’s Complaint “consist[s] of mere conclusions in the form of allegations
10 [that] fall woefully short of establishing a claim against Defendants for
11 any constitutional violation.” (ECF No. 26 at 2-5).

12 **II. BACKGROUND FACTS**

13 The facts are taken from Plaintiff’s Complaint and are not to be
14 construed as findings of fact by the Court.

15 Plaintiff’s claims arise from a series of events that occurred while
16 Plaintiff was held at GBDF as a subpoenaed witness for an evidentiary
17 hearing in the criminal case of another state prisoner. (ECF No. 1 at 3).
18 Plaintiff was placed in an administrative segregation unit (“Module 5A”) and
19 immediately “noticed unconstitutional living conditions . . . and began the
20 ‘grievance process.’” (*Id.*). Plaintiff filed grievances alleging cruel and
21 unusual living conditions, lack of access to the law library and law books,
22 failure to provide three hours of recreation time, failure to provide a kosher
23 diet or religious services and reading material and that Defendants were
24 posting “excessive personal and private information” on cell doors. (*Id.* at 4).

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27 ² Plaintiff’s opposition also includes several other claims that Defendants’
motion to dismiss do not challenge.

1 Plaintiff's Complaint describes his claim in nine counts as follows:

2 In count one, Plaintiff contends that Defendants Barrera, Stapleton and
3 Benjamin violated his First Amendment right to freedom of speech by
4 retaliating against him for filing grievances. (*Id.* at 4-6).

5 In count two, Plaintiff contends that Defendants Barrera, Sanchez,
6 Stapleton and Benjamin imposed cruel and unusual conditions of
7 confinement in violation of the Eighth Amendment. (*Id.* at 7-8).

8 In count three, Plaintiff contends Defendants Barrerra and Sanchez
9 violated his equal protection rights when they treated him differently than
10 other inmates and made "racially insensitive slurs" targeted at his Jewish
11 faith. (*Id.* at 8-9).

12 In count four, Plaintiff contends that Defendants Benjamin, Barrera,
13 Sanchez and Stapleton violated his due process rights under the Fourteenth
14 Amendment. (*Id.* at 9; ECF No. 1-1 at 1).

15 In count five, Plaintiff contends that on November 17, 2014, Defendants
16 Benjamin, Stapleton, Barrera and Sanchez used excessive force upon him.
17 (ECF No. 1-1 at 1-3).

18 In count six, Plaintiff contends Defendants Barrera, Sanchez and
19 Stapleton assaulted and battered him during the excessive force incident
20 explained in count six. (*Id.* at 5).

21 In count seven, Plaintiff contends that he received inadequate medical
22 care from an unknown person treating Plaintiff's injuries sustained during
23 the assault, battery and excessive force incident. (*Id.* at 5-6).

24 In count eight, Plaintiff contends that some unknown person committed
25 medical malpractice and was medically negligent when treating Plaintiff's
26 injuries. (*Id.* at 6).

1 In count nine, Plaintiff contends Defendants Barrera, Sanchez,
2 Stapleton and Benjamin intentionally inflicted emotional distress upon
3 Plaintiff. (*Id.*).

4 III. STANDARD OF REVIEW

5 “A Rule 12(b)(6) motion tests the legal sufficiency of a claim.” *Navarro*
6 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Under Federal Rule of Civil
7 Procedure 8(a)(2), a pleading must contain a short and plain statement of the
8 claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556
9 U.S. 662, 677-78 (2009) (internal quotations omitted). The pleader must
10 provide the Court with “more than an unadorned, the-defendant-unlawfully-
11 harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v.*
12 *Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the elements of
13 a cause of action, supported by mere conclusory statements, do not suffice.”
14 *Iqbal*, 556 U.S. at 678. “Although for the purposes of a motion to dismiss [a
15 court] must take all of the factual allegations in the complaint as true, [a
16 court is] not bound to accept as true a legal conclusion couched as a factual
17 allegation.” *Iqbal*, 556 U.S. at 678 (internal quotations omitted).

18 A *pro se* pleading is construed liberally on a defendant’s motion to
19 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895
20 (9th Cir. 2002) (citing *Ortez v. Washington Cnty. Oregon*, 88 F.3d 804, 807
21 (9th Cir. 1996)). The *pro se* pleader must still set out facts in his complaint
22 that bring his claims “across the line from conceivable to plausible.”
23 *Twombly*, 550 U.S. at 570. A court “may not supply essential elements of the
24 claim that were not initially pled.” *Ivey v. Bd. of Regents*, 673 F.2d 266, 268
25 (9th Cir. 1982). A *pro se* litigant is entitled to notice of the deficiencies in the
26 complaint and an opportunity to amend, unless the complaint’s deficiencies
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1 cannot be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448
2 (9th Cir. 1987).

3 **IV. DISCUSSION**

4 The Court will only address challenged claims brought against
5 Defendants Benjamin and Stapleton. Those claims are: (1) count one, First
6 Amendment retaliation against Defendant Benjamin; (2) count two, Eighth
7 Amendment cruel and unusual punishment against both Defendants; (3)
8 count three, Fourteenth Amendment violation of the Equal Protection Clause
9 against Defendant Benjamin; (4) count four, Fourteenth Amendment
10 violation of due process against Defendant Stapleton; (5) count nine,
11 intentional infliction of emotional distress against Defendant Stapleton; and
12 (6) the timeliness of Plaintiff's state law claims. (*See* ECF Nos. 1, 12-1).

13 **A. First Amendment Retaliation Claim**

14 In count one, Plaintiff alleges that Defendant Benjamin retaliated
15 against Plaintiff in violation of the First Amendment for filing grievances.
16 (ECF No. 1 at 4). Plaintiff alleges that Defendant Benjamin was in charge of
17 the grievances filed in Plaintiff's housing unit and was required to respond,
18 process, investigate and resolve grievances, or forward them to someone who
19 could address and resolve the grievances. (*Id.* at 4).

20 After Plaintiff began filing grievances, Defendant Benjamin "came to
21 Plaintiff's cell screaming to stop filing grievances and if not, she would have
22 him moved to module 5C" where mentally ill inmates are housed and
23 explained that no grievance would fix the inadequate living conditions. (*Id.*
24 at 5). Plaintiff continued to file grievances and began helping other inmates
25 file grievances. (*Id.*). In retaliation, Defendant Benjamin instructed others
26 to move Plaintiff to Module 5C. (*Id.*). Module 5C "had a constant smell of
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feces coming out of the ventilation system and continued banging noises.”
(*Id.*).

Plaintiff filed a retaliation grievance against Defendant Benjamin for moving him to Module 5C, alleging he was moved “for the sole purpose of separating Plaintiff from other inmates he had been assisting with their grievances and to deter Plaintiff and other inmates from continuing to redress their grievances” and alleging that Defendant Benjamin refused to log inmate grievances. (*Id.*).

Defendants assert that count one must be dismissed because Plaintiff did not allege that Defendant Benjamin’s conduct was retaliatory, her alleged conduct did not prevent Plaintiff from filing grievances and there is no due process right for prisoners to file grievances.³ (ECF No. 12-1 at 3-4).

The First Amendment protects against “deliberate retaliation” by prison officials against an inmate’s exercise of his right to petition for redress of grievances. *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). Such conduct is actionable even if it would not otherwise rise to the level of a constitutional violation because retaliation by prison officials may chill an inmate’s exercise of legitimate First Amendment rights. *Thomas v. Carpenter*, 881 F.2d 828, 830 (9th Cir. 1989). A prisoner suing prison officials for retaliation must allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action did not advance legitimate penological goals. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir.

³ Plaintiff also alleges Defendant Stapleton acted in retaliation, however Defendants did not respond to Plaintiff’s allegation that Defendant Stapleton destroyed Plaintiff’s property in retaliation for filing grievances. (See ECF No. 12-1).

1 1995); *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994); *Rizzo v.*
2 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985).

3 In *Rhodes v. Robinson*, the Ninth Circuit set forth five basic elements of
4 a viable claim of First Amendment retaliation: “(1) [a]n assertion that a state
5 actor took some adverse action against an inmate (2) because of (3) that
6 prisoner’s protected conduct, and that such action (4) chilled the inmate’s
7 exercise of his First Amendment rights, and (5) the action did not reasonably
8 advance a legitimate correctional goal.” *Brodheim v. Cry*, 584 F.3d 1262,
9 1269 (9th Cir. 2009) (citing *Rhodes v. Robinson*, 408 F.3d 559, 567-68 n.11
10 (9th Cir. 2005)).

11 **1. Adverse Action Against an Inmate**

12 The first element of the *Rhodes* pleading standard requires Plaintiff to
13 make an assertion that a state actor took some adverse action against him.
14 *Rhodes*, 408 F.3d at 567-68. Plaintiff contends that Defendant Benjamin
15 threatened to move Plaintiff to Module 5C if he continued to file grievances
16 and later ordered Plaintiff be moved as a specific consequence of his
17 continued filing of grievances. (ECF No. 1 at 5). The cell Plaintiff was placed
18 in was dirty and covered in feces. (ECF No. 25 at 5). Plaintiff also alleges
19 that Defendant Benjamin retaliated by “refus[ing] to correctly process all . . .
20 grievances.” (ECF No. 1 at 5); (*see also* ECF No. 25 at 6).

21 The threat that Defendant Benjamin made and the later move to
22 Module 5C, which Plaintiff characterized as a less desirable living situation,
23 provide sufficient facts to allege the required adverse action. *See Watison v.*
24 *Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (“[T]he mere threat of harm can
25 be adverse action”); *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009)
26 (allowing a retaliation claim to proceed when a grievance decider made an
27 implicit threat of retaliation regarding use of the grievance process); *Puckett*

1 *v. Sweis*, No. 2:15-cv-0602-AC P, 2016 WL 632795, at *4 (E.D. Cal. Feb. 16,
2 2016) (“[A]t the pleading stage, ‘allegations of harm [are] sufficient to ground
3 a First Amendment retaliation claim without discussing whether that harm
4 had a chilling effect.”); *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004)
5 (retaliatory placement in administrative segregation for filing grievances is
6 an adverse action); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995)
7 (retaliatory prison transfer and double-cell status in retaliation constitutes
8 adverse action). Defendant Benjamin’s alleged failure to properly process
9 grievances also satisfies the first element of the *Rhodes* pleading standard.
10 *Harbridge v. Schwarzenegger*, No. CV 07-4486-GW(SH), 2009 U.S. Dist.
11 LEXIS 129379, at *36 (C.D. Cal. Aug. 13, 2009) (finding that the plaintiff
12 satisfied element one of the *Rhodes* standard where he alleged that his
13 prisoner grievances were not properly processed and his complaints were not
14 adequately investigated). Accordingly, the first element of the *Rhodes*
15 pleading standard is met. *See Rhodes*, 408 F.3d at 568 (arbitrary confiscation
16 and destruction of property and initiation of prison transfer are adverse
17 actions).

18 **2. Because of**

19 The second element of the *Rhodes* pleading standard requires Plaintiff
20 to make an assertion that a state actor took some adverse action against an
21 inmate *because* he exercised his First Amendment right. *Rhodes*, 408 F.3d at
22 567-68. Plaintiff alleges he was moved to Module 5C at the behest of
23 Defendant Benjamin and that his grievances were not properly processed
24 “because not only did Plaintiff continue to file grievances, but started
25 assisting other inmates to file their grievances.” (ECF No. 1 at 5; *see* ECF
26 No. 25 at 6). Plaintiff also contends Defendant Benjamin had him moved “for
27 the sole purpose of separating Plaintiff from other inmates he had been

1 assisting with their grievances and to deter Plaintiff and other inmates from
2 continuing to redress their grievances.” (ECF No. 1 at 5). Therefore, Plaintiff
3 satisfies the second element of the *Rhodes* pleading standard.

4 **3. Prisoner’s Protected Conduct**

5 The third element of the *Rhodes* pleading standard requires Plaintiff to
6 show he exercised protected conduct. *Rhodes*, 408 F.3d at 567-68. Plaintiff
7 alleges that Defendant Benjamin’s actions “violated Plaintiff’s First
8 Amendment Rights by preventing an avenue to seek actual relief for his
9 grievances.” (ECF No. 1 at 6). This satisfies the third element of the *Rhodes*
10 pleading standard. *See Rhodes*, 408 F.3d at 567 (“of fundamental import to
11 prisoners are their First Amendment ‘right[s] to file prison grievances’”).

12 **4. Chilled First Amendment Rights**

13 The fourth *Rhodes* pleading standard element requires Plaintiff to show
14 that the harm chilled the exercise of his First Amendment right. *Rhodes*, 408
15 F.3d 567-68. A plaintiff is not required to allege “a *total* chilling of his First
16 Amendment rights to file grievances and to pursue civil rights litigation in
17 order to perfect a retaliation claim. Speech can be chilled even when not
18 completely silenced.” *Id.* at 568 (emphasis in original). The Court must ask
19 “whether an official’s acts would chill or silence a person of ordinary firmness
20 from future First Amendment activities.” *Mendocino Envtl. Ctr. v.*
21 *Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (internal citations
22 and quotations omitted).

23 Defendants contend that “the complaint does not allege facts that
24 demonstrate Benjamin’s alleged conduct prevented Plaintiff from using the
25 grievance process, thereby having a chilling effect on his First Amendment
26 rights. To the contrary, Plaintiff admits he continued to file grievances and
27 assisted other inmates in filing grievances as well.” (ECF No. 12-1 at 4).

1 Defendants are incorrect. The face of Plaintiff's Complaint alleges that
2 his First Amendment rights were chilled. (ECF No. 1 at 5). Plaintiff
3 specifically alleges that Defendants retaliated against him for the sole
4 purpose of "deter[ring] Plaintiff and other inmates from continuing to redress
5 their grievances." (*Id.*). Plaintiff's admission that he continued to file
6 inmate grievances even after Defendants retaliated against him does not
7 negate a chilling effect. *See Rhodes*, 408 F.3d at 568-69 (rejecting argument
8 that inmate failed to state retaliation claim where, after alleged adverse
9 action, plaintiff nonetheless had been able to file inmate grievances and a
10 lawsuit); *see also Martinez v. Muniz*, No. 14-cv-03753-HSG (PR), 2016 WL
11 3208398, at *13 (N.D. Cal. June 10, 2016) (finding that a plaintiff's continued
12 filing of inmate appeals does not negate the existence of a chilling effect).
13 Transferring an inmate to a less desirable living situation and improperly
14 handling grievances would "chill or silence a person of ordinary firmness."
15 *Mendocino Evtl. Ctr.*, 192 F.3d at 1300. Therefore, Plaintiff satisfies the
16 fourth element of the *Rhodes* pleading standard despite the fact Plaintiff
17 continued to file inmate appeals because the chilling effect need not be so
18 great as to totally silence the inmate.

19 **5. Action Did Not Reasonably Advance a Legitimate**
20 **Correctional Goal**

21 The fifth and final element of the *Rhodes* pleading standard requires
22 Plaintiff to make an assertion that Defendant Benjamin's actions did not
23 advance a legitimate correctional goal. *Id.* at 567-68. Plaintiff's Complaint
24 alleges that Defendant Benjamin told Plaintiff "no grievance will fix the
25 problems with [the] inadequate living conditions." (ECF No. 1 at 5). This
26 suggests that Defendant Benjamin retaliated against Plaintiff because his
27 grievance efforts would be futile, not to support legitimate penological

1 interests. The Court construes Plaintiff's allegations to allege that Defendant
2 Benjamin's conduct was "arbitrary and capricious" rather than actions that
3 advance legitimate goals of the correctional institution that were narrowly
4 tailored to achieve such goals. *See Rizzo*, 778 F.2d at 532 (finding that the
5 plaintiff alleged that the defendants' actions were retaliatory and arbitrary
6 and capricious, showing that they did not serve any legitimate correctional
7 goal). Accordingly, Plaintiff satisfies the fifth element of the *Rhodes* pleading
8 standard.

9 **6. Conclusion**

10 Plaintiff's Complaint satisfies the *Rhodes* pleading standard. The
11 Court, therefore, **RECOMMENDS** that Defendants' Motion to Dismiss count
12 one of Plaintiff's Complaint (First Amendment Retaliation) as to Defendant
13 Benjamin be **DENIED**.

14 **B. Eighth Amendment Unsanitary Living Conditions**

15 On October 14, 2014, Plaintiff was transferred to GBDF and ultimately
16 placed in Module 5C at Defendant Benjamin's order.⁴ (ECF No. 1 at 7).
17 Module 5C houses inmates with serious mental health issues "who are known
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20 ⁴ Plaintiff also alleges that he was transferred to the San Diego Central Jail
21 on October 13, 2014, where San Diego Sheriff's Deputies warned him that his
22 life would "be made as 'miserable as possible'" and placed him in "an
23 extremely dirty and unsanitary cell that had trash and feces spread all over
24 the cell. (ECF No. 1 at 7). Plaintiff complained to the Sheriff's Deputies for
25 four hours before he was moved to a clean cell. (*Id.*). The Court notes that
26 Plaintiff's alleged unsanitary living conditions at the San Diego Central Jail
27 are not at issue in this case. (*See id.*). Plaintiff's Complaint does not name
any Defendants employed at the San Diego Central Jail and does not allege
that the named Defendants were responsible for the living conditions at the
San Diego Central Jail. (*See id.* at 2-3). Accordingly, the Court will only
analyze the alleged unsanitary living conditions at GBDF.

1 to throw feces and continuously bang on their cell doors and toilets at all
2 hours of the day.” (*Id.* at 5). Plaintiff alleges that Module 5C’s living
3 conditions were unconstitutional because of the “constant smell of feces
4 coming out of the ventilation system[,] . . . continued banging noises” and
5 because the cell was covered in feces. (*Id.* at 5, 7; ECF No. 25 at 5). Plaintiff
6 asserts that Defendants Benjamin and Stapleton were aware of the
7 unsanitary living conditions and that Defendant Stapleton was blatantly
8 indifferent to Plaintiff’s complaints of unsanitary living conditions. (ECF No.
9 1 at 7). Defendants argue that Plaintiff’s facts do not show that either
10 Defendant Stapleton or Defendant Benjamin caused “any of these alleged
11 experiences or conditions.” (ECF No. 12-1 at 6).

12 The Eighth Amendment provides that prison conditions must not
13 amount to cruel and unusual punishment. U.S. CONST. amend. VIII. “The
14 Constitution does not mandate comfortable prisons, but neither does it
15 permit inhumane ones.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)
16 (internal quotations and citations omitted). Prison officials must provide
17 inmates with the basic necessities of life, such as food, clothing, shelter,
18 sanitation, medical care and personal safety. *Id.* at 832. A successful
19 conditions of confinement claim must show that (1) the deprivation of the
20 basic necessities of life is, objectively, sufficiently serious; and (2) the prison
21 official acted with deliberate indifference. *Id.* at 834. Deliberate indifference
22 exists where an “official knows of and disregards an excessive risk to inmate
23 health or safety; the official must both be aware of the facts from which the
24 inference could be drawn that a substantial risk of harm exists, and he must
25 also draw the inference.” *Id.* at 837.

26 “Filthy conditions can infringe on an inmate’s basic human need for
27 sanitary living conditions.” *Carr v. Tousley*, No. CV-06-0125S JLQ, 2009 WL

1 1514661, at *22 (D. Idaho, May 27, 2009); *see Anderson v. County of Kern*, 45
2 F.3d 1310, 1314, *as amended*, 75 F.3d 448 (9th Cir. 1995) (“[A] lack of
3 sanitation that is severe or prolonged can constitute an infliction of pain
4 within the meaning of the Eighth Amendment.”). Courts have recognized
5 that proof of conditions similar to those alleged by Plaintiff may be sufficient
6 to establish an Eighth Amendment claim. *Cagle v. Gravlin*, No. 9:09-CV-
7 0648, 2010 WL 2088267, at *6 (N.D.N.Y. Apr. 29, 2010) (Lowe, M.J.) (finding
8 the plaintiff’s allegations that he was subjected to feces on the wall and gate
9 sufficient to plausibly suggest that he was subjected to unconstitutional
10 conditions of confinement), *Report and Recommendation Adopted*, 2010 WL
11 2087437 (N.D.N.Y. May 25, 2010) (Scrullin, S.D.J.); *Hamilton v. Conway*, No.
12 03-CV-527S, 2008 WL 234216, at *8-9 (W.D.N.Y. Jan. 28, 2008) (recognizing
13 that allegations of excessive noise and inmates throwing feces in SHU may
14 support an Eighth Amendment claim). Thus, at this stage in the
15 proceedings, the Court **RECOMMENDS** Defendants’ Motion to Dismiss
16 count two of Plaintiff’s Complaint against Defendants Benjamin and
17 Stapleton (Eighth Amendment Cruel and Unusual Punishment) be **DENIED**.

18 **C. Fourteenth Amendment Equal Protection Clause Violation**

19 Plaintiff alleges that Defendants used “disrespectful language in
20 reference to Plaintiff’s Jewish religion,” intentionally made it difficult for
21 Plaintiff to contact his attorneys and family members by giving him access to
22 the dayroom at midnight and by turning off the telephone in the dayroom on
23 November 17, 2014. (ECF No. 1 at 8). Plaintiff also claims that Defendant
24 Benjamin, as a supervisor, “allowed and encouraged rampant disrespect and
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1 retribution” against Plaintiff due to him being a “Hispanic Jew.”⁵ (ECF No.
2 25 at 7).

3 Defendants’ argument focuses on Plaintiff’s First Amendment right to
4 religious accommodations. (ECF No. 12-1 at 5-6). Defendants’ argument is
5 misplaced. Plaintiff’s Complaint alleges violations of the Equal Protection
6 Clause. (ECF No. 1 at 8). While Plaintiff does explain that he was denied
7 religious accommodations, including a kosher diet, religious services and
8 copies of a Torah and Tanakh, he does so to explain the type of grievances he
9 filed that resulted in Defendants’ retaliation against him in count one of the
10 Complaint and not as a separate cause of action. (ECF No. 1 at 4).

11 The Equal Protection Clause of the Fourteenth Amendment requires
12 the State to treat all similarly situated people equally. *See City of Cleburne*
13 *v. City of Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). “Moreover, the
14 Equal Protection Clause entitles each prisoner to ‘a reasonable opportunity of
15 pursuing his faith comparable to the opportunity afforded fellow prisoners
16 who adhere to conventional religious precepts.’” *Shakur v. Schriro*, 514 F.3d
17 878, 891 (9th Cir. 2008) (quoting *Cruz v. Beto*, 405 U.S. 319, 322 (1972)).
18 This does not mean that all prisoners must receive identical treatment and
19 resources. *See Cruz*, 405 U.S. at 322 n.2; *Ward v. Walsh*, 1 F.3d 873, 880 (9th
20 Cir. 1993); *Allen v. Toombs*, 827 F.2d 563, 568-69 (9th Cir. 1987).

21 “To prevail on an Equal Protection claim brought under § 1983,
22 Plaintiff[] must allege facts plausibly showing that the defendants acted with
23

24 ⁵ In his Opposition to Defendants’ Motion to Dismiss, Plaintiff for the first
25 time asserts that Defendant Stapleton verbally abused him for his chosen
26 religion. (ECF No. 25 at 8). The Court will not analyze whether Defendant
27 Stapleton violated Plaintiff’s Equal Protection rights because he is not listed
in the Complaint’s Equal Protection claim. (See ECF No. 1 at 8-9).

1 an intent or purpose to discriminate against [him] based upon membership in
2 a protected class.” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114,
3 1123 (9th Cir. 2013) (internal citations and quotations omitted).

4 Discriminatory intent or purpose “implies that the decision maker . . .
5 selected or reaffirmed a particular course of action at least in part ‘because
6 of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”
7 *Pers. Adm’r of Mass. V. Feeney*, 442 U.S. 256, 279 (1979). The Equal
8 Protection Clause prohibits the government from engaging in discrimination
9 that burdens a fundamental right, such as religious freedom. *See City of*
10 *Cleburne*, 473 U.S. at 440.

11 Plaintiff sufficiently alleges membership in a protected class because he
12 is Jewish. (ECF No. 1 at 4, 8). Within the Equal Protection count on pages
13 eight and nine of his Complaint, Plaintiff explains that Defendants made
14 “racially insensitive slurs” and that Defendant Benjamin ordered others to
15 move Plaintiff to Module 5C. (*Id.* at 9). Further, Plaintiff explains that
16 Defendant Benjamin “allowed and encouraged rampart disrespect and
17 retribution against Plaintiff as a practicing Jew.” (ECF No. 25 at 7).
18 Drawing all reasonable inferences in favor of Plaintiff, the Complaint also
19 sufficiently alleges that Defendant Benjamin acted with the requisite
20 discriminatory intent or purpose. *See Vann v. Hernandez*, No. 1:07-cv-01238-
21 LJO-SMS PC, 2008 WL 4500230, at *2 (E.D. Cal. Oct. 6, 2008) (Jewish
22 plaintiff showed discriminatory intent or purpose where defendants “made
23 remarks critical of plaintiff’s religion”); *Bachman v. Melo*, No. 1:05-CV-
24 01438OWWLJOP, 2006 WL 1455443, at *2 (E.D. Cal. May 25, 2006) (Jewish
25 homosexual plaintiff showed discriminatory intent or purpose where
26 defendants called him a “Christ killing Jewish fag”); *Epileptic Found. v. City*
27 *& County of Maui*, 300 F. Supp. 2d 1003, 1013 (D. Haw. 2003) (discriminatory

1 intent evident where park official used racial slur). Accordingly, at this stage
2 in the proceedings, the Court **RECOMMENDS** that Defendants' Motion to
3 Dismiss count three of Plaintiff's Complaint against Defendant Benjamin
4 (Equal Protection Clause violation) be **DENIED**.

5 **D. Fourteenth Amendment Due Process Violation**

6 Plaintiff alleges that Defendant Stapleton violated Plaintiff's due
7 process rights by confiscating his personal property, including legal
8 documents, original grievances, stamped envelopes, personally made
9 drawings, books, canteen items and Plaintiff's address book. (ECF No. 1-1 at
10 1). Defendants argue that there is no due process right to destruction of
11 personal property where there is an alternate remedy available.⁶ (ECF No.
12 12-1 at 6).

13 Prisoners have a protected interest in their personal property under the
14 Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); *Hansen v.*
15 *May*, 502 F.2d 728, 730 (9th Cir. 1974). An authorized, intentional
16 deprivation of property is actionable under the Due Process Clause. *See*
17 *Hudson v. Palmer*, 468 U.S. 517, 532 n.13 (1984) (citing *Logan v. Zimmerman*
18 *Brush Co.*, 455 U.S. 422, 435-36 (1982)). Neither negligent nor unauthorized
19 intentional deprivations of property give rise to a violation of the Due Process
20 Clause if the state provides an adequate post-deprivation remedy. *Hudson*,
21 468 U.S. at 533 n.14. "In other words, only an authorized intentional
22 deprivation of property is actionable under the Due Process Clause.
23 Authorized deprivations of property are permissible if carried out pursuant to
24 a regulation that is reasonably related to a legitimate penological interest."

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26
27 ⁶ Defendants do not challenge Plaintiff's claim that Defendant Benjamin had
Plaintiff transferred to Module 5C without due process. (*See* ECF No. 12-1).

1 *Haraszewski v. Knipp*, No. 2:13-cv-2494 DB P, 2016 WL 6766750, at *3 (E.D.
2 Cal. Nov. 14, 2016).

3 Plaintiff vaguely alleges that Defendant Stapleton illegally “confiscated
4 Plaintiff’s personal property” in retaliation for filing a Petition for Writ of
5 Habeas Corpus. (ECF No. 1-1 at 1). “Plaintiff’s allegations of wrongful,
6 retaliatory confiscation of his personal property does not support a claim.
7 Unauthorized, bad-faith behavior does not support a federal due process
8 claim” if a meaningful postdeprivation remedy is available for the loss. *Chick*
9 *v. Lacey*, No. 1:11-cv-01447-GBC (PC), 2012 WL 3912796, at *5 (E.D. Cal.
10 Sept. 7, 2012) (citing *Hudson*, 468 U.S. at 533); *Hudson*, 468 U.S. at 533. The
11 Ninth Circuit has held that “California Law provides an adequate post-
12 deprivation remedy for any property deprivations.” *Barnett v. Centoni*, 31
13 F.3d 813, 816-17 (9th Cir. 1994); *see also* Cal. Gov’t Code §§ 810-895. “It is
14 immaterial whether or not Plaintiff succeeds in redressing his loss through
15 the available state remedies; it is the existence of these alternate remedies
16 that bars him from pursuing a § 1983 procedural due process claim.”
17 *Hutchison v. Marshall*, No. CV 09-04540-ABC (VBK), 2011 WL 862118, at *9
18 (C.D. Cal. Feb. 3, 2011) (citing *Willoughby v. Luster*, 717 F. Supp. 1439, 1443
19 (D. Nev. 1989)).

20 Accordingly, the Court **RECOMMENDS** Defendants’ Motion to Dismiss
21 Plaintiff’s violation of due process against Defendant Stapleton be
22 **GRANTED** and Plaintiff be given leave to amend. *Lopez v. Smith*, 203 F.3d
23 1122, 1130 (9th Cir. 2000) (en banc); *Noll*, 809 F.2d at 1448-49.

24 **E. Intentional Infliction of Emotional Distress**

25 In count nine, Plaintiff contends Defendant Stapleton intentionally
26 inflicted emotional distress upon Plaintiff by “taunting and
27 psychologically/verbal[ly] abus[ing] Plaintiff [for three hours] prior to

1 physically assaulting him.”⁷ (ECF No. 1-1 at 6). Plaintiff alleges that he was
2 given dayroom access at 12:30 a.m. and asked to make a phone call, but the
3 phone had been turned off. (*Id.* at 2). From 1:00 a.m. to 4:00 a.m., Defendant
4 Stapleton “verbally harassed Plaintiff by calling him disrespectful names (i.e.
5 ‘bitch,’ ‘kike,’ ‘punk,’ ‘sewer rat,’ etc.) and . . . attempted to ‘psych out’ the
6 Plaintiff by flashing the overhead lights and opening/closing/clicking the front
7 and side doors.” (*Id.* at 3). Plaintiff claims that “[a]fter 3 hours of suffering
8 this abuse, Plaintiff was mentally exhausted, distraught, and distressed.”⁸
9 (*Id.*).

10 Defendants contend Plaintiff’s claim against Defendant Stapleton’s
11 conduct should be dismissed because there generally is no recovery for “mere
12 profanity, obscenity, or abuse, without circumstances of aggravation, or for
13 insults, indignities or threats which are considered to amount to nothing
14 more than mere annoyances.” (ECF No. 12-1 at 5) (internal quotations and
15 citations omitted).

16 A claim for intentional infliction of emotional distress requires a
17 plaintiff to prove “(1) extreme and outrageous conduct by the defendant with
18

19
20 ⁷ Intentional infliction of emotional distress is a state law claim. The court
21 has jurisdiction over Plaintiff’s civil rights causes of action pursuant to 28
22 U.S.C. § 1331 and supplemental claims, including intentional infliction of
23 emotional distress, pursuant to 28 U.S.C. § 1367.

24 ⁸ Plaintiff also contends that Defendant Stapleton is liable for intentional
25 infliction of emotional distress for his alleged destruction of Plaintiff’s
26 property and that Defendant Benjamin is liable for transferring Plaintiff to
27 Module 5C. (ECF Nos. 1-1 at 6; 25 at 7-8). Defendants do not challenge
these allegations. (*See* ECF No. 12-1 at 5). Accordingly, the Court will not
determine whether these claims are sufficiently plead so as to survive a
motion to dismiss.

1 the intention of causing, or reckless disregard of the probability of causing,
2 emotional distress; (2) the plaintiff's suffering severe or extreme emotional
3 distress; and (3) actual and proximate causation of the emotional distress by
4 the defendant's outrageous conduct.” *Doe v. Gangland Prods.*, 730 F.3d 946,
5 960 (9th Cir. 2013) (quoting *Davidson v. City of Westminster*, 32 Cal. 3d 197,
6 209 (1982)).

7 Plaintiff properly pled a claim for intentional infliction of emotional
8 distress against Defendant Stapleton. Plaintiff alleged that (1) Defendant
9 Stapleton intentionally attempted to “psych out” Plaintiff by flashing lights,
10 opening and closing doors and verbally abusing or taunting him for a period
11 of three hours in the early morning; (2) Plaintiff suffered mental exhaustion
12 and distress; and (3) Defendant Stapleton’s conduct was the actual cause of
13 Plaintiff’s emotional distress. (ECF Nos. 1 at 3; 1-1 at 6). Thus, Plaintiff
14 sufficiently stated a claim for intentional infliction of emotional distress
15 against Defendant Stapleton to survive a motion to dismiss.

16 Accordingly, the Court **RECOMMENDS** that Defendants’ Motion to
17 Dismiss Plaintiff’s intentional infliction of emotional distress claim (count
18 nine) against Defendant Stapleton for taunting and harassing Plaintiff for
19 three hours be **DENIED**.

20 **F. Timeliness**

21 Defendants allege that Plaintiff’s state claims must be dismissed as
22 untimely pursuant to California Government Code §945.6(a)(1). (ECF No.
23 12-1 at 7). Defendants claim that Plaintiff failed to timely file the instant
24 action within six months after the August 27, 2015, rejection of Plaintiff’s
25 state tort claims against Defendants Benjamin and Stapleton. (*Id.* at 7; ECF
26 No. 12-2 at 3). Plaintiff contends that he mailed his Complaint on February
27

26, 2016, making his state claims timely under the mailbox rule. (ECF No. 25 at 9).

Before a state law claim can be brought in state or federal court, the California Tort Claims Act requires that a claim against a public entity or its employees be presented to the California Victim Compensation and Government Claims Board no more than six months after the cause of action accrues. Cal. Gov't Code §§ 905, 945.4, 950.2; *Hernandez v. McClanahan*, 996 F. Supp. 975, 977 (N.D. Cal. 1998) (failure to present timely California tort claims bars plaintiff from bringing them in federal suit). If the claim is rejected, the claimant has six months to file a lawsuit. Cal. Gov't Code § 945.6. Under the mailbox rule, *pro se* prisoner documents are considered filed as of the date the prisoner delivers the document to prison authorities. *Houston v. Lack*, 487 U.S. 266, 275-76 (1988); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (holding that the *Houston* mailbox rule applies to § 1983 suits filed by *pro se* prisoners).

On August 27, 2015, the County of San Diego mailed Plaintiff a "Notice of Rejection of Claim." (ECF No. 12-2 at 3). The Complaint was signed by Plaintiff, a *pro se* prisoner, and the envelope was dated and signed by "Davis" on February 26, 2016. (ECF No. 1-1 at 9, 11). Under the mailbox rule, Plaintiff's Complaint was timely filed on February 26, 2016, which is five months and thirty days from the dated "Notice of Rejection of Claim." (See ECF Nos. 1-1; 12-2). Thus, Plaintiff's Complaint is timely and the Court **RECOMMENDS** that Defendants' Motion to Dismiss Plaintiff's state causes of action as untimely be **DENIED**.

V. CONCLUSION

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that:

- 1 1) Defendants' Motion be **DENIED** as to Plaintiff's First
2 Amendment retaliation claim against Defendant Benjamin (count one);
3 2) Defendants' Motion be **DENIED** as to Plaintiff's Eighth
4 Amendment claim against Defendants Benjamin and Stapleton (count two);
5 3) Defendants' Motion be **DENIED** as to Plaintiff's Fourteenth
6 Amendment Equal Protection Claim against Defendant Benjamin (count
7 three);
8 4) Defendants' Motion be **GRANTED** as to Plaintiff's Fourteenth
9 Amendment Due Process claim against Defendant Stapleton and Plaintiff be
10 given **LEAVE TO AMEND** (count four);
11 5) Defendants' Motion be **DENIED** as to Plaintiff's intentional
12 infliction of emotional distress claim against Defendant Stapleton for
13 taunting and harassing Plaintiff for three hours (count nine); and
14 6) Defendants' Motion be **DENIED** as to Plaintiff's state law claims.

15 This Report and Recommendation will be submitted to the United
16 States District Judge assigned to this case, pursuant to the provisions of 28
17 U.S.C. § 636(b)(1). Any party may file written objections with the court and
18 serve a copy on all parties by **May 12, 2017**. The document shall be
19 captioned "Objections to Report and Recommendation." Any reply to the
20 objections shall be served and filed by **May 19, 2017**.

21 The parties are advised that failure to file objections within the
22 specified time may waive the right to raise those objections on appeal of the
23 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

24 **IT IS SO ORDERED.**

25 Dated: April 19, 2017



Hon. Mitchell D. Dembin
United States Magistrate Judge

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